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THE AMERICAN INTERPRETATION OF THE MOST FAVORED NATION DOCTRINE.

THE SCOPE and meaning of the most favored nation clauses in our various treaties has provoked wide discussion and equally wide diversity of opinion. The arena of the official controversy has been a shifting one, sometimes diplomatic and sometimes judicial. The form of the usual language of compact is decidedly stereotyped, suggesting certain canons of interpretation which had become crystallized and generally accepted. The facts are quite otherwise. Articles V and IX of the Treaty of 1828 between the United States and Prussia, which by consent applies to the German Empire as well,[1] may be taken as models.

ARTICLE V.

"No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Prussia, and no higher or other duties shall be imposed on the importation into the Kingdom of Prussia of any article the produce or manufacture of the United States, than are or shall be payable on the like article being the produce or manufacture of any other foreign country. Nor shall any prohibition be imposed on the importation of any article the produce or manufacture of the United States, or of Prussia, to or from the ports of the United States, or to or from the ports of Prussia, which shall not equally extend to all other nations."

ARTICLE IX.

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately

[1] Disconto Gesellschaft *v.* Umbreit, 208 U. S. 570; North German Lloyd S. S. Co. *v.* Hedden, 43 Fed. 17.

become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional."

Both provisions occur in a number of treaties, as in the case of the Austrian Treaty of 1829 and the Russian Treaty of 1832, which last expired on January 1, 1913, by reason of the act of denunciation by the United States. Where only one provision is found, the preference has been for the form of stipulation in Article IX. Most of the treaties with the European Powers contain this article and many of them have the equivalent of Article V. Such are the treaties with Norway, Sweden, Belgium and Italy. The treaty with Great Britain of July 3, 1815, is an exception in this respect. It contains only the equivalent of Article V. When we come to consider the question whether these typical favored nation provisions are self-executing or merely executory, the difference in the language employed might easily be viewed as of the highest importance and such is the intimation of the United States Court of Customs Appeals, which has lately spoken. No distinction on this account has ever been urged by our government, however, and it seems to have been tacitly, if not expressly, conceded that both forms of stipulation are of equal force and application.

Some principles are fairly well settled. One of the earliest disputes raged around the question whether the favored nation clause imposes any limitation upon a nation's right to enter into special agreements with another nation upon terms of mutual reciprocity. In other words, does the granting of any particular favor in navigation or commerce by one nation to another state in exchange for a valuable consideration granted by that state to it oblige such nation to grant immediately the same favor to all the states enjoying most favored nation privileges? If this inquiry is to be answered in the affirmative it is, of course, at once apparent that some nations would obtain as a free gift the favor which another nation had acquired by purchase and the motive to negotiate treaties and reciprocity agreements would largely vanish. Upon this question the United States early took a decided stand, which for many years was

sharply challenged, but our unwavering insistence upon a coherent principle is now so far generally recognized that it is at least tacitly acquiesced in by most foreign nations. Historically the American doctrine has been that reciprocal agreements do not invade the favored nation clause, but that a gratuitous concession does. John Quincy Adams in 1817 formulated in clear language the American or "restricted" view, as opposed to what may be called the European or "unrestricted" view. By Act of Congress, March 3, 1815, vessels of foreign countries were exempted from discriminating duties in ports of the United States on condition of a like exemption of American vessels in the ports of such foreign countries. The exemption was taken advantage of by Great Britain but not by France. The French Minister at Washington claimed that the exemption granted to British shipping should be secured to French shipping by virtue of Article VIII of the Treaty of 1803. The Secretary of State, Mr. Adams, replied on December 23, 1817:

> "The undersigned is instructed to say that the vessels of France are treated in the ports of Louisiana, upon the footing of the most-favored nation, and that neither the English nor any other foreign nation enjoys any gratuitous advantage there which is not equally enjoyed by France. But English vessels, by virtue of a conditional compact, are admitted into the ports of the United States, including those of Louisiana, upon payment of the same duties as the vessels of the United States. The condition upon which they enjoy this advantage is, that the vessels of the United States shall be admitted into ports of Great Britain upon payment of the same duties as are there paid by the British vessels.
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> "The eighth article of the treaty of cession stipulates that the ships of France shall be treated upon the footing of the most-favored nations in the ports of the ceded territory; but it does not say, and can not be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent. * * *
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> "It is true that the terms of the eighth article are positive and unconditional, but it will readily be perceived that the condition, though not expressed in the article, is inherent in the advantage claimed under it. If British vessels enjoyed, in the ports of Louisiana, any gratuitous favor, undoubtedly

French vessels would by the terms of the article, be entitled to the same."[2]

In a report dated November 24, 1844, Secretary of State Upshur referred to the favored nation stipulations in certain treaties with German states, among them the kingdom of Prussia, in this language:

"It may be proper to remark that the proposed treaties will not effect the provisions of existing treaties with other foreign powers. The stipulation is found in many of them that if the United States should grant more favorable terms to any other nation those terms should be considered as extending to the parties to those treaties.

"But this stipulation is always understood as conditional; that is, that the advantages of the new treaty shall be given only on the same terms on which they are given to the party of that treaty. If they be given without equivalent, they must also be given to those nations without equivalent; if they be given in consideration of equivalents, no nation can claim them under the general stipulation above mentioned without offering a like equivalent."[3]

For a comparatively recent reiteration of this doctrine, see dispatches of Mr. Bayard, Secretary of State, cited in Moore's Digest, to wit:[4]

"A covenant to give privileges granted to the 'most-favored nation,' it was held by two of the most distinguished of my predecessors, Mr. Clay and Mr. Edward Livingston, only refers to 'gratuitous privileges' and does not cover privileges granted 'on the condition of a reciprocal advantage.' * * * You will doubtless have understood that where the words 'qualified' and 'unqualified' are * * * applied to the most-favored nation treatment, they are used merely as a convenient distinction between the two forms such a clause generally assumes in treaties, one containing a proviso that any favor granted by one of the contracting parties to a third party shall likewise accrue to the other contracting party, freely if freely given, or for an equiva-

[2] This case is cited in Moore's "International Law Digest," vol. 5, page 257, and "'Reciprocity' Treaties, Favored Nation Clauses," 62d Congress, 1st Session, Sen. Doc. No. 29.

[3] 28th Cong., 1st Sess., Doc. No. 1, page 20.

[4] Vol. 5, pages 272 and 273.

lent if conditional—the other not so amplified. This proviso, when it occurs, is merely explanatory, inserted out of abundant caution. Its absence does not impair the rule of international law that such concessions are only gratuitous (and so transferable) as to third parties when not based on reciprocity or mutually reserved interests as between the contracting parties. This ground has been long and consistently maintained by the United States. It was held by two of my predecessors, Mr. Clay and Mr. Livingston, that a covenant to extend to third parties privileges granted to a most-favored nation only refers to 'gratuitous privileges' and does not cover privileges granted 'on the condition of a reciprocal advantage,' *i. e.*, for a consideration expressed.

"A covenant to give privilege granted to the 'most favored nation' only refers to gratuitous privileges, and does not cover privileges granted on the condition of a reciprocal advantage." [5]

The Supreme Court has likewise sanctioned the American view. In 1875 the United States concluded a reciprocity treaty with the Hawaiian Islands making certain concessions including free sugar in exchange for valuable concessions in return. It was contended that the favored nation clause in the Treaty with Denmark operated to compel the free admission of Danish sugars and molasses into the United States imported from the Islands of St. Croix in the West Indies. In Bartram *v.* Robertson [6] the Supreme Court passed upon this contention and said:

"'No higher or other duties' were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to the other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration, that is, it was *to be enjoyed freely if the concession were freely made*, or on allowing the same compensation if the concession were conditional.

* * * * * * * *

"Our conclusion is that the treaty with Denmark does not bind the United States to extend to that country, without

[5] Mr. Livingston, Secretary of State, to President Jackson, Jan. 6, 1832, cited in "Wharton's Digest," Vol. 2, § 134, p. 39.

[6] 122 U. S. 116.

> compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty."

This principle was reiterated in Whitney *v.* Robertson,[6a] affirming Bartram *v.* Robertson, that the favored nation clauses in our treaties "were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges."

An exception to what has become our fixed policy, more apparent perhaps than real, was based on the Swiss Treaty of 1850 and is referred to by Moore.[7] Section III of the Tariff Act of July 24, 1897, known as the Dingley law, authorized the President to conclude in a limited way reciprocity agreements with respect to specified articles. Under this grant of authority President McKinley entered into an agreement with France on May 30, 1898. At once Switzerland demanded the same rates for similar articles of Swiss produce and manufacture imported into the United States. The Secretary of State made the usual conventional rejoinder, but the Swiss Minister was able to show that the Treaty of 1850 differed from most treaties concluded by the United States and that the absence of certain language of limitation was intentional.[8] This was ultimately conceded to carve out an exception to our usual rule. The Treasury Department accordingly issued instructions retroactive in character making the desired concessions.[9]

In another important respect one other well-settled rule of American jurisprudence has brought us into collision with the view taken by European writers on international law who hold that a treaty is to be terminated only as its terms provide. The power of Congress to abrogate or rescind treaties has been upheld repeatedly. This power flows from the limitations of the

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[6a] 124 U. S. 190.
[7] Volume 5, page 283.
[8] U. S. Foreign Relations, 1899, pp. 740, *et seq.*
[9] T. D. 20386.

Constitution itself, which make a law and a treaty alike the supreme law of the land, neither being paramount to the other. It follows, then, that the last expression of the sovereign will controls. A case often cited, which affords good illustration of this principle, is that of Taylor *v.* Morton [10] decided by Mr. Justice Curtis of the Supreme Court sitting at circuit. Here the favored nation clauses of our treaty with Russia in 1832 came into conflict with the Tariff Act of 1842, which was held to impose a duty of $25 a ton on Manila hemp and a duty of $40 a ton upon Russian hemp. This was followed a little later by the similar case of Ropes *v.* Clinch.[11] These were decisions of inferior courts, but in the Head Money cases[12] and in the Chinese Exclusion cases[13] the Supreme Court upheld the right of Congress to enact laws rescinding treaty stipulations. In the Fong Yue Ting case Mr. Justice Gray summarized the rule in this single sentence:

> "In our jurisprudence, it is well settled that the provisions of an act of Congress passed in the exercise of its constitutional authority on this, as on any other subject, if clear and explicit, must be upheld by the courts even in contravention of express stipulations in an earlier treaty." [14]

Whilst this, then, is the established American rule, the corrollary to it, which has often received judicial approval, is that an intent to violate a treaty stipulation is not to be imputed to Congress unless clearly and unmistakably manifested. The rule is well stated in Whitney *v.* Robertson [15] and it is set forth at some length in various other decisions, notably in the Chinese Exclusion cases, where the Supreme Court, with this approved principle of interpretation before it, did in fact in some cases reconcile antecedent treaties with subsequent acts of Congress so as to give force and effect to both. It is worth while to devote a little space to reviewing the language of some of these decisions, because they elaborate an exceedingly important principle in our jurisprudence.

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[10] 2 Curt. 454, 23 Fed. Cas. 784.
[11] 2 Blatch 304, 20 Fed. Cas. 1171.
[12] 112 U. S. 580 (1884).
[13] 130 U. S. 581 (1889) and 149 U. S. 698 (1893).
[14] 149 U. S. 720. [15] 124 U. S. 190.

"If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States or supersede them altogether. *By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either;* but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing." [16]

"When the act of 1882 was passed, Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer. The presumption must be indulged that the broad language of these sections was intended to apply to those Chinese laborers whose coming to this country might, consistently with the treaty, be reasonably regulated, limited or suspended, and not to those who, by the express words of the same treaty, were entitled to go and come of their own free will, and enjoy such privileges and immunities as were accorded to the citizens and subjects of the most favored nation." [17]

"It is impossible to entertain the belief that the Congress of the United States, immediately after the conclusion of a treaty between this country and the Chinese Empire, would, while assuming to carry out its provisions, pass an act which violated or unreasonably obstructed the obliga-

[16] Whitney *v.* Robertson, 124 U. S. 190, at p. 194.
[17] Chew Heong *v.* United States, 112 U. S. 536, at p. 550.

tion of any provision of the treaty. As was stated by Mr. Justice Harlan in delivering the opinion of the court in Chew Heong *v.* United States, 112 U. S. 536, 539: 'The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country. * * * Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.' We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution and not to violate the provisions of the treaty." [18]

"It is not disputed that if the stipulations of the treaty and the requirements of the act of Congress are found to be irreconcilably conflicting, it is the duty of the court to obey the law, as being the latest expression of the legislative will, and to leave the question of the breach of the treaty stipulation to be settled by the political branch of the government. *But before we can impute to Congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the law, which is supposed to constitute the violation, must admit of no other reasonable construction.*" [19]

"That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another

[18] United States *v.* Mrs. Gue Lim, 176 U. S. 459, at p. 465.
[19] In re Chin A On, 18 Fed. 506.

nation, so the United States may by treaty supersede a prior act of Congress on the same subject."

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"In the case of statutes alleged to be inconsistent with each other in whole or in part, the rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that 'there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto,* to the extent of the repugnancy;' and that 'if harmony is impossible, and only in that event, the former is repealed in part or wholly, as the case may be.' Wood *v.* United States, 16 Pet. 342, 363; United States *v.* Tynen, 11 Wall. 88, 93; State *v.* Stoll, 17 Wall. 425, 431. In Frost *v.* Wenie, 157 U. S. 46, 58, this court said: 'It is well settled that repeals by implication are not to be favored. And when two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.'

"The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a prior treaty between the United States and China. Chew Heong *v.* United States, 112 U. S. 536, 550. In that case it was held that the treaty could stand with the subsequent statutes, and, consequently, it was enforced." [20]

The language in Ropes *v.* Clinch,[21] although that of a lower court, as already mentioned, is particularly apt:

"By express, unequivocal, and in no sort doubtful or uncertain terms, the Congress of the United States, by the act of 1861, declared that the duty upon Russia hemp imported to this country should be forty dollars per ton. When a statute is brought before the court for considera-

[20] United States *v.* Lee Yen Tai, 185 U. S. 213, at pp. 221, 222.
[21] *Supra.*

tion there arise, ordinarily, two questions: first—what is the import of the statute? and, second—what is its legal force and effect? As to the import of the statute in this case, I do not understand that the counsel insist that it is open to any doubt. It is not claimed that the words of the act can be construed otherwise than they were construed by the collector of this port when he exacted this duty. They mean just this—that the party importing Russia hemp to this country shall pay forty dollars per ton, as duty thereon to the United States. *Now, if the language were doubtful, if it were possible to give it another meaning, more conclusive force would be due to the arguments which have been urged upon this occasion, for the purpose of inducing the court to say that the statute did not repeal the treaty. In such case, it would be the duty of the court to look at the treaty, and, if it be possible to find an interpretation of the statute which will involve no infraction of the treaty, no violation of the pledged faith of the government of the United States to the government of another country, to give it that interpretation, and without hesitation. That, however, is not this case. There is no doubt of the import of the language of this statute, and no room for construction; and, further, the statute can mean nothing else. It is not a question of doubtful interpretation; its language cannot be modified by a qualification; if it could, it might be my duty to qualify it.*"

It is to be observed that while a search will disclose a number of instances where acts of Congress have directly collided with treaty provisions, this power has been sparingly exercised. It is not to be doubted that the disposition of both the executive and legislative branches of the government is to terminate an inconvenient treaty in the approved way—that is, by an act of denunciation in accordance with its express terms. A conspicuous illustration of this was the joint resolution of Congress giving the one year's notice, pursuant to its terms, of the intent to abrogate the Russian Treaty of 1832, which accordingly terminated on January 1, 1913. The same course was pursued with respect to the Swiss Treaty of 1850. Following the recognition by this government of the validity of the Swiss claim for the lower tariff rates of the French Reciprocity Agreement of 1898 elsewhere alluded to, the United

States gave notice on March 23, 1899, of its intention to arrest the operation of various articles, including those upon which the Swiss claim was based.

Any inquiry into the limitations and extent of the favored nation privilege involves a survey of the century-old debate upon the scope of the treaty making power itself. All the text-book writers review the controversy more or less in detail. Perhaps the most thorough and satisfactory review can be found in Butler's "Treaty Making Power." Volume I, Chapter IX, contains an interesting exposition of the opinions of publicists and expounders of the Constitution. Men like Rawle, George Ticknor Curtis, Joseph Story, Judge Cooley, Professor Pomeroy, and Chancellor Kent attribute to the treaty making function a wide range of powers. On the other side John C. Calhoun and John Randolph Tucker have been the leading champions of those who would encompass the treaty making powers within the narrowest limitations.

The first great controversy was over the Jay Treaty. For discussion of this, see Butler, Vol. I, Chapter X. At one state of the congressional debate the House of Representatives called for certain papers.[22] Washington's reply to the House of Representatives has great historic interest by reason of the uncompromising view he takes at the very beginning of our government of the scope of the treaty making power. He said in part:

> "Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the Government to this moment my conduct has exemplified that opinion—that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty making power has been understood by foreign nations, and in all the treaties made with them we have declared and they have believed that, when ratified

[22] *Ibid,* Vol. 1, p. 425.

by the President, with the advice and consent of the Senate, they became obligatory." [23]

Butler in the final chapter of his work observes:

"The question is not whether the power is limited or unlimited, but at what point do the limitations begin." [24]

The case which answers this query somewhat decisively is that of Geofroy *v.* Riggs.[25] In this case, decided by the Supreme Court in 1889, it was held that a citizen of France could take land in the District of Columbia by descent from a citizen of the United States. Mr. Justice Field in his opinion refers to the seventh article of the Treaty of Commerce and Navigation between France and the United States of the 30th of September, 1800, and says: [26]

"This article, by its terms, suspended during the existence of the treaties the provisions of the common law of Maryland and of the statutes of that State of 1780 and of 1791, so far as they prevented citizens of France from taking by inheritance from citizens of the United States property, real or personal, situated therein."

The French treaty expired by its own limitations in 1809 and the court construed the provision of the subsequent Convention between the United States and France of February 23, 1853, and the Act of Congress of March 3, 1887, in connection with the Maryland Law of 1801, saying:

"*That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear.* * * * *The treaty power, as exprssed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments,* and those arising from the nature of the government itself and of that of the States. *It would not be contended that it extends so far as to authorize what the Constitution forbids,* or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, with-

[23] *Ibid,* Vol. 1, p. 427.
[24] Vol. 2, p. 350.
[25] 133 U. S. 258.
[26] 133 U. S. 266.

> out its consent. Fort Leavenworth Railroad Co. *v.* Lowe, 114 U. S. 525, 541. *But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.* Ware *v.* Hylton, 3 Dall. 199; Chirac *v.* Chirac, 2 Wheat. 259; Hauenstein *v.* Lynham, 100 U. S. 483; 8 Opinions Attys. Gen. 417; The People *v.* Gerke, 5 California 381." [27]

By reason of the constitutional prohibition [28] no treaty calling for the payment of money can be carried into effect until Congress votes the necessary appropriation. It has been so held.[29] Article III of the Treaty of Peace with Spain of 1898 called for the payment to Spain for the cession of the Philippine Islands the sum of $20,000,000. Congress voted the money.

A branch of our discussion, not to be overlooked, goes to the efficacy of the favored nation clause as a rule of guidance in the determination of public and private rights. Can this clause, for example, operate to reduce or waive rates of duty upon imported merchandise without the express sanction of Congress first had and obtained in each instance? This is ancillary to the inquiry whether a commercial treaty in and of itself can alter rates of duty without the concurrence of the House of Representatives. It is at least a partial answer to say that precedents exist for changes in tariff laws through the operation of a treaty alone. The most recent instance is the one elsewhere mentioned, where the Treasury Department in December, 1898, ordered collectors of customs to accord to certain Swiss products the provided rates of duty set forth in the French Reciprocity Agreement. This order affected all entries from and after June 1 of that year. No legislative assent was asked for or accorded, nor was the right of the Secretary to take this step ever challenged by resolution or otherwise.

In an opinion prepared for Secretary of State Marcy during the Pierce Administration, Attorney General Cushing, as an example of a treaty repealing a prior act of Congress alluded to the 7th article of the treaty between the United States

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[27] 133 U. S. 266 and 267. [28] Article I, § 9.

[29] Turner *v.* American Baptist Missionary Union, 5 McLean 344, 24 Fed. Cas. 344.

and France of the 4th of July, 1831. This treaty, which was ratified on the 2nd of February, 1832, imposed a lower rate of duty on French wines than was provided for by the then existing tariff law of 1828. "These wines," the Attorney General said, "became chargeable *at once* with the lower duty"— in other words, the treaty was self-executing, though, as the Attorney General points out, Congress in the next tariff revision of July 14, 1832, adopted the treaty rates. As instances of executory treaty provisions requiring the aid of an act of Congress, Mr. Cushing enumerated various treaty articles calling for indemnity payments.[29a] It is to be said, however, that not all of his successors have been in full accord with the views thus expressed by Attorney General Cushing.

Various claims for favored nation treatment upon the importation of cotton goods of British manufacture growing out of alleged discriminations under the Acts of May 22, 1824, and August 30, 1842, were for a long time pending in a diplomatic way before our State Department. On the other hand, American diplomatic representatives in London had for years sought favored nation satisfaction in what is known as the rough rice case and also in the matter of the alleged discrimination upon the exportation of woolen goods from Great Britain to the United States. In his annual message President Tyler in December, 1843, thus alluded to this controversy:

> "Two other subjects of comparatively minor importance, but nevertheless of too much consequence to be neglected, remain still to be adjusted between the two countries. By the treaty between the United States and Great Britain of July, 1815, it is provided that no higher duties shall be levied in either country on articles imported from the other than on the same articles imported from any other place. In 1836 rough rice by act of Parliament was admitted from the coast of Africa into Great Britain on the payment of a duty of 1 penny per quarter, while the same article from all other countries, including the United States, was subjected to the payment of a duty of 20 shillings per quarter. Our minister at London has from time to time brought this subject to the attention of the British Gov-

[29a] VI Opinions Attorneys General 291.

ernment, but so far without success. He is instructed to renew his representations upon it.

"Some years since a claim was preferred against the British Government on the part of certain American merchants for the return of export duties paid by them on shipments of woolen goods to the United States after the duty on similar articles exported to other countries had been repealed, and consequently in contravention of the commercial convention between the two nations securing to us equality in such cases. The principle on which the claim rests has long since been virtually admitted by Great Britain, but obstacles to a settlement have from time to time been interposed, so that a large portion of the amount claimed has not yet been refunded. Our minister is now engaged in the prosecution of the claim, and I can not but persuade myself that the British Government will no longer delay its adjustment." [30]

The history of the so-called rough rice case, which contains much interesting matter on the subject of favored nation, can be found in Ho. Rep. Doc. 278, 28th Cong., 1st Sess.

It appears that the British Government, among other pleas advanced for resisting satisfaction, contended that the exemption was an act of humanity. To this Mr. Everett replied in a communication to the Earl of Aberdeen dated October 23, 1842:

"The first ground assumed by Lord Aberdeen is that as no injury was intended or was done to the United States by the partial relaxation of the higher duty in favor of particular district of Africa from motives not of gain or other advantage to Great Britain, but of humanity to the negro race, restitution of the higher duty levied on American rice is not justly to be claimed. But surely Lord Aberdeen will not maintain the principle that it is not at any time permitted to one party to a treaty to contravene its stipulations provided the contravention takes place for a human object and, as may afterwards be held, without injury to the other party. This would be sufficient ground on which to purpose to the other party to agree to a modification of the compact; *but they cannot justify its infraction. They strike at the root of public faith between governments.* It is the object of treaties to place matters secured by them beyond the control

[30] Messages and Papers of the Presidents, Vol. IV, 259.

of either party. * * * It cannot be necessary to urge that either party has a right to insist upon the strict and literal performance of the contract even though a departure from it would not be injurious."

Under date of August 8, 1843, Mr. Upshur who had succeeded Mr. Webster as Secretary of State, wrote to Mr. Everett:

"It seems to me that your argument is unanswerable; and the best proof of it is that no attempt has been made to answer it. I have, therefore, nothing to add except that the claim must be strenuously insisted upon. To abandon it would be in effect to abandon all reciprocity under the Treaty of 1815."

Ultimately a number of favored nation claims, both British and American, were referred to a Commission appointed under the Convention of February 8, 1853, where they were in each instance finally adjusted and allowed, except in the matter of the exportation of woolen goods which was settled by the British Government in a satisfactory manner and withdrawn from the Commission. These various cases can be found in the Commission Proceedings published as Ex. Doc. 103, 34th Cong., 1st Sess. The cotton and woolen cases are referred to in John Bassett Moore's International Arbitration.[31]

"By tariff act of 1842, 'Tea and coffee when imported in American vessels from the places of their growth or production,' were made free of duty; but when otherwise imported were subject to a duty of 20 per cent. ad valorem.

" 'Soon after the passage of this act, the question of the validity of the 20 per cent. duty on the subjects of The Netherlands was presented to this government, in a remonstrance from the Charge d'Affaires of that Nation. * * * During the recess of Congress, the Secretary of the Treasury took the subject into his own hands, and has superseded the action of this House, on the pending question, by a full and unreserved concession of the whole subject-matter under investigation, even to the extent of refunding all duties collected since 1842.

[31] Volume IV, p. 4938.

Report Committee on Commerce, Ho. Rep. 188, 28th Congress, 2d Sess." [32]

No investigation into favored nation privileges can proceed very far without merging into the broader inquiry which is inseparable from every discussion of the American treaty making power:

"How far is the assent of the House of Representatives essential to the validity of a treaty negotiated by the President and ratified by two-thirds of the Senate present and concurring."

This question has engaged the attention of the constitutional lawyers in both branches of Congress and in the early days of the Republic, especially, the dispute at times waxed warm. In more recent times the practice has very generally prevailed of inserting a provision calling for the express assent of Congress before commercial treaties become effective, though there has never been any formal recognition on the part of the Senate that such a step was necessary. The adoption of this sort of a *modus vivendi* with respect to the exercise of one important branch of the treaty function has tended to keep the main question in abeyance. In the case of the Commercial Convention with Cuba in 1902—one of the most recent instances—a provision was inserted in Article XI (by the Senate I believe) that "this convention shall not take effect until the same shall have been approved by Congress." One of the later efforts on the part of the House to assert its pretentions was when in 1887 it passed a resolution directing the judiciary committee to inquire into the facts relating to the Treaty of 1884, extending the reciprocity treaty of 1875 with the Hawaiian Islands, and to report:

"Whether a treaty involves the rate of duty to be imposed on any article, or the admission of any article free of duty, can be valid and binding without the concurrence of the House of Representatives, and how far the power conferred on the House by the Constitution of the United States to originate measures to lay and collect duties can be controlled by the treaty-making power under said Constitution."[33]

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[32] Herod's Favored Nation Treatment, p. 65.

[33] Butler, Vol. 1, p. 439.

Mr. John Randolph Tucker, then in the House, made a lengthy report, which was submitted on March 3, 1887. In making an elaborate argument in favor of limitations upon the treaty making power, he says:

"The convention purposes an additional term of seven years for the duration of the original treaty, by which duties on articles imported into the United States from the Hawaiian Islands were regulated, and this 'definite extension' is proposed to be done without the consent of this House and without a law of Congress. The original treaty was conditioned for its effect in an act of Congress. That act sanctioned the terms of the treaty for seven years. This supplementary convention extends its operations for seven years more, and *does not condition this extension in an act of Congress.*

"This, if conceded, would involve the power of indefinite extension without an act of Congress, and is liable to all the objections urged in the previous part of this report. In truth its concession would virtually surrender the domain of tariff regulations to the treaty-making authority of the President and Senate."

The following recommendations were made:

"(1) That the President, by and with the advice and consent of the Senate, cannot negotiate a treaty which shall be binding on the United States, whereby duties on imports are to be regulated, either by imposing or remitting, increasing or decreasing them, without the sanction of an act of Congress; and that the extension of the term for the operation of the original treaty or convention with the government of the Hawaiian Islands, proposed by the supplementary convention of December 6, 1884, will not be binding on the United States without like sanction, which was provided for in the original treaty and convention, and was given by act of Congress.

"(2) That the President is respectfully requested to withhold final action upon the proposed convention, and to condition its final ratification upon the sanction of an act of Congress, in respect of the duties upon articles to be imported from the Hawaiian Islands." [34]

No action was ever taken upon this report. The Supplementary Convention was duly proclaimed by President Cleveland

[34] Ho. Rep. Report 4177, 49th Cong., 2d Sess.

without any assent on the part of the House and it continued to remain in force until the cession of the Hawaiian Islands in 1898.

The champions of the prerogatives of the House of Representatives rest their case upon the constitutional provision that Congress shall have the power to lay and collect taxes, duties, imposts and exercises [35] and also upon the provision that all bills for the raising of revenue shall originate in the House.[36] It may be questioned whether a reciprocity treaty is a revenue bill within the meaning of the Constitution. In United States *v.* Norton,[73] the Supreme Court held that an act to establish a postal money order system was not a revenue law.

> "The precise question before us came under the consideration of Mr. Justice Story, in the United States *v.* Mayo, 1 Gall. 396. He held that the phrase *revenue laws,* as used in the act of 1804, meant such laws '*as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government.*' The same doctrine was reaffirmed by that eminent judge, in the United States *v.* Cushman, 426.
>
> "These views commend themselves to the approbation of our judgment."

But just as Congress has power to lay taxes and duties, so it has various other specific grants of power, such as regulating commerce and establishing a uniform rule of naturalization. Indeed all *legislative* powers are vested in Congress. The logic of those who seek to keep the treaty making power within the narrowest compass would in effect restrict its exercise to that very limited subject matter for negotiation which is beyond the jurisdiction of Congress. In other words, except in the sense that the House is a part of the treaty making power, the grant of authority to that power and to Congress is not coincident but each occupies a separate and distinct field of operation. To illustrate, Congress has no power to legislate with respect to the status of American consuls in a foreign jurisdiction. That, however, might be properly a subject of treaty stipulation. On the other hand, treaties of commerce, of naturalization, and of extradition,

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[35] Art. I, § 8.
[36] Art. I, § 7.
[37] 91 U. S. 566.

would seem, from the standpoint of the champions of the House pretentions in treaty making, to require assent of the House before they can be deemed to be valid and of binding force. This extreme view is clearly inconsistent with the position taken by the Supreme Court, especially in Geoffroy *v.* Riggs.[38] Neither does it seem to harmonize with the intention of the framers of the Constitution, as can be gathered from the debates of that period. The proposition to make the House a part of the treaty-making power was formally considered and rejected in the Constitutional Convention of 1787.

> "The fourth section, to wit: 'The President, by and with the advice and consent of the Senate, shall have power to make treaties,' etc., was then taken up.
>
> "Mr. Wilson moved to add, after the word 'Senate,' the words, *'and House of Representatives.'* As treaties, he said, are to have the operation of laws, they ought to have the sanction of laws also. The circumstance of secrecy in the business of treaties formed the only objection; but this, he thought, so far as it was inconsistent with obtaining the legislative sanction, was outweighed by the necessity of the latter.
>
> "Mr. Sherman thought the only question that could be made was, whether the power could be safely trusted to the Senate. He thought it could; and that the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature."

Mr. Wilson's motion was lost, one state voting aye and ten states voting no.[39] It is interesting to note that in the New York Convention on the Adoption of the Federal Constitution, of which Alexander Hamilton, who participated in the Federal Convention at Philadelphia was a member, this amendment was proposed and adopted:

> "Resolved, as the opinion of this committee that no treaty ought to operate so as to alter the constitution of any state; *nor ought any commercial treaty to operate so as to abrogate any law of the United States.*"[40]

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[38] *Supra.*

[39] Madison Papers, Vol. 3, p. 1518.

[40] Elliott, Vol. 2, p. 409.

Hamilton's views on the scope of the treaty-making powers are set forth very clearly in the draft of a message prepared by him for the use of Washington in reply to the call for papers relating to the Jay Treaty in 1796.

"The Constitution of the United States empowers the President, with the advice and consent of the Senate, two-thirds concurring, to *make* treaties. It nowhere professes to authorize the House of Representatives or any other branch of the government to partake with the President and Senate in the making of treaties. The whole power of making treaties is therefore by the Constitution vested in the President and Senate.

"To make a treaty, as applied to nations, is to *conclude* a contract between them *obligatory on their faith;* but that can not be an obligatory contract, to the validity and obligation of which the assent of another power in the state is constitutionally necessary.

"Again, the Constitution declares that a treaty made under the authority of the United States shall be a 'supreme law of the land,'—let it be said 'a law.' A *law* is an obligatory rule of action *prescribed* by the competent authority, but that cannot be an obligatory rule of action or a law, to the validity and obligation of which the assent of another power in the state is constitutionally necessary.

"Hence a discretionary right in the House of Representatives to assent or not to a treaty, or, what is equivalent, to execute it or not, would negative these two important provisions of our Constitution—1st, that the President and Senate shall have power to make treaties; 2dly, that a treaty made by them shall be a law; and in the room of them would establish this provision, 'that the power of making treaties resides in the President, Senate, and House of Representatives.' For, whatever coloring may be given, a right of discretionary assent to a contract is a right to participate in the making of it." [41]

The conflict between the scope of the treaty-making power on the one hand and state sovereignty on the other was much in evidence during the era preceding the Civil War. It has recently been revived by the alien land law agitation in California, which was frankly aimed, I suppose it would be conceded, at Japanese

[41] Lodge's Hamilton, Vol. 8, p. 165, *et seq.*

subjects especially. May the United States enter into a treaty defining the status of foreign subjects—their right to travel, reside and engage in business *anywhere* within our territories, their right to own and devise property, real and personal, which rights shall be respected and capable of enforcement while the treaty exists on an equality with similar rights of citizens of the United States or citizens of the most favored nation? Or may the individual states infringe such a treaty at their pleasure and is the regulation of these rights, which so intimately and vitally affect the states, reserved to them alone?

Without entering upon the debatable ground whether the alien laws of the Pacific Coast do or do not conflict with existing treaties, it is certainly true that the situation in California has brought all these questions acutely to the fore again. The subject is a big one; it involves the question of the "police power," and there is space hardly to scratch the surface of it. It was especially troublesome during the period when the states rights view was the most strongly asserted. In 1823 South Carolina enacted a law to prohibit free negroes and persons of color from entering the state, and one, Henry Elkison, a British subject was under this act taken from a vessel flying the British flag and placed under arrest by Francis Deleisseline, the sheriff of the Charleston District. In *habeas corpus* proceedings, Judge William Johnson, himself a South Carolinian, condemned the state law strongly as being unconstitutional, but held that he was without power to grant relief under the federal law as it stood. Stratford Canning, then British Minister at Washington, in the meantime had lodged a vigorous protest, and William Wirt of Virginia, Attorney General, in an opinion, dated May 8, 1824, addressed to the Secretary of State, said:

> "By the national constitution the power of making treaties with foreign nations is given to the general government; and the same constitution declares that all the treaties so made shall constitute a part of the law of the land. The national government has exercised this power also of making treaties. We have treaties subsisting with various nations by which the commerce of such nations with the United States is expressly authorized without any restriction as to the color of the crews by which it shall be carried

> on. We have such a treaty with Great Britain as to which nation this question has arisen. The Act of South Carolina forbids (or what is the same thing, punishes) what this treaty authorizes.
>
> "I am of the opinion that the section of the law under consideration is void as being against the Constitution, treaties and laws of the United States, and incompatible with the rights of all nations in amity with the United States."

A few years later Jackson's Attorney General, John M. Berrien, of Georgia, re-examined the whole question—this time in connection with Daniel Fraser, a free colored man born in the British West Indies. In a very able opinion, which has an undisguised state rights bias, dated March 5, 1831, Berrin considers state laws flowing from the police power at some length and his contention seemed to be that there was a "duty or constitutional obligation—not definitely defined—upon the national government to refrain from invading this field in interference with the state sovereignty." He argued that the grant of the Legislature of the Union was not an unfettered right to be capriciously exercised but, in so far as the right was indispensable to the plenary exercise of the power intended to be conferred by the Constitution, the Legislature of the Union had power to enact, and the state legislature must bend beneath its sway. The admission of colored seamen to our ports, he went on to say, was a matter of convenience rather than necessity—therefore, there should be such a modification of our commercial regulations as would exclude them from the ports of slave-holding states, leaving them free to enter all our other ports. When the national act paralyzes the reserved right of the state sovereignties, Congress should take the method which does not conflict. Accordingly Congress was under the constitutional obligation to respect the Act of South Carolina in the formation of treaties and in the enactment of laws, and those who were called upon to interpet such treaties and acts were equally bound so to construe them as to restrain the generality of their expressions within the limits of this obligation.

When this debate was renewed on the floor of Congress in 1842, President Tyler forwarded a series of state papers contain-

ing all the details of this interesting controversy.[42] On Jan. 20, 1843, Mr. Winthrop from the Committee on Commerce made a report "that the seizure and imprisonment in any port of this Union of free colored seamen on board foreign vessels, against whom there is no charge but that of entering said port in the course of their lawful business, is a breach of the comity of nations, is incompatible with all rights of nations in amity with the United States and, in relation to nations with which the United States have formed commercial conventions, is a violation of the 6th Article of Federal Constitution, which declares that the treaties are a part of the supreme law of the land. He also argued that interference with free colored seamen citizens of the states was a violation of the Fourth Article.

The outcome, in the end, of the British diplomatic protest was that foreign subjects of color were unmolested, though the status of free persons of color from Northern states remained a bone of contention to the end.

The first decision of the Supreme Court to uphold the rights of foreign subjects guaranteed by treaties and infringed by the states is that of Ware, Administrator of Jones, *v.* Hylton, *et al.* decided in 1796—a Virginia case. William Jones, a British subject originally, sued a citizen of Virginia upon a debt. The defendant pleaded payment to the State of Virginia under a state law of sequestration. The plaintiff urged the Fourth Article of the Treaty of Peace of 1783. The court upheld the treaty. This language of Mr. Justice Chase, who wrote the main opinion, has often been cited:

> "There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty,

[42] Ho. Rep. Report, No. 80, 27th Cong., 3rd Sess.

> and fall before it, can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded." [43]

I refer to one other case of comparatively recent date, likewise arising in Virginia, Hauenstein *v.* Lynham,[44] decided in 1879. Under the laws of Virginia aliens were incapable of taking property by inheritance. Solomon Hauenstein died in Richmond intestate. His heirs at law, Swiss subjects, filed a petition relying upon the Swiss Treaty of 1850 with which the state law was said to be in conflict. The court reversed the judgment of the Court of Appeals of Virginia and upheld the treaty rights. Justice Swayne's opinion reviewed Ware *v.* Hylton,[45] Chirac *v.* Chirac,[46] Carneal *v.* Banks,[47] Hughes *v.* Edwards,[48] Orr *v.* Hodgson,[49] and Fairfax's Devisees *v.* Hunter's Lessee.[50]

It should be said in this connection that the state courts have repeatedly upheld the right of foreign consuls to administer the estates of deceased foreign subjects and this by reason of the operation of the favored nation clause *proprio vigore*.[51] In

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[43] 3 Dall. 198, 235.
[44] 100 U. S. 483.
[45] 3 Dall. 199.
[46] 2 Wheat. 259.
[47] 10 Wheat. 181.
[48] 9 Wheat. 489.
[49] 4 Wheat. 453.
[50] 7 Blatch. 627.

[51] In re Fattosini's Estate, 67 N. Y. Supp. 1119; In re Lobrasciano's Estate, 77 N. Y. Supp. 1046; In re Scutella's Estate, 129 N. Y. Supp. 20; McEvoy, Public Administrator *v.* Wyman, 191 Mass. 276; Carpigiani *v.* Hall, 55 So. 248.

The very recent case of Rocco *v.* Thompson, 223 U. S. 317, upheld the adverse view taken by the Supreme Court of California, but upon the express ground that the Argentine Treaty upon which the Italian Consul relied by virtue of the operation of the most favored nation principle did not have the scope and effect claimed for it.

taking this attitude the state courts would but seem to be heeding the Sixth Article of the Constitution, which provides:

> "That all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; *and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*"

How far now may the aid of the federal courts be invoked to enforce rights secured by favored nation provisions? What are the judicial limitations? It is apparent that such limitations exist and that if, for instance, the question is political in character, or, if it imports an executory rather than a self-executing contract, the courts will not take jurisdiction. Is the usual favored nation stipulation self-executing and how far does it operate to create rights which may be judicially defined and enforced? I have already referred to the line of state cases which have held the favored nation clause to be self-executing for the purpose of securing to foreign consuls privileges in connection with the administration of the estates of decedent aliens. I now wish to draw attention to the significance of the Chinese Exclusion cases—particularly Chew Heong *v.* United States.[52]

Prior to 1880 Chinese subjects had in the United States all the privileges of subjects in the most favored nation. In 1880 a treaty was concluded which in effect prohibited the emigration of Chinese laborers. The Supreme Court thus states the case historically:

> "Before referring to the treaty of 1880, it will be well to ascertain, from those previously concluded between the United States and China, what were the relations of trade and commerce existing between their respective peoples. By the treaty of peace, amity and commerce, concluded in 1858, citizens of the United States, in China, peaceably attending to their affairs, were placed on a common footing of amity and good will with subjects of the latter country; entitled to receive and enjoy, for themselves and everything pertaining to them, the protection of the local authorities of government, who were required to defend

[52] 112 U. S. 536.

them from insult or injury of any sort; those residing or sojourning at any of the ports open to foreign commerce were permitted to rent houses and places of business, or hire sites on which they could themselves build houses, hospitals, churches and cemeteries; to frequent certain designated ports and cities, and any other port or place thereafter, by treaty with other powers or with the United States, opened to commerce; to reside with their families and trade at such places, and to proceed at pleasure with their vessels and merchandise to and from said ports or any of them; *at each of said ports open to commerce to import from abroad, and to sell, purchase and export all merchandise of which the importation or exportation was not prohibited by the laws of China, subject to no higher duties than those paid by the most favored nation. By that treaty, also, any right, privilege or favor, connected either with navigation, commerce, political or other intercourse, thereafter granted by China to the citizens of any nation, was at once to freely inure to the benefit of the United States, its public officers, merchants and citizens* (12 Stat. 1025, *et seq.*). * * *

"In the treaty concluded July 28, 1868, the governments of the United States and China recognized 'the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects, respectively, from one country to the other, for purposes of curiosity, of trade, or as permanent residents.' They, therefore, joined in reprobating any other than an entirely voluntary emigration for those purposes. *By that treaty it was, also, provided, that citizens of the United States visiting or residing in China, and Chinese subjects visiting or residing in the United States, should enjoy the same privileges, immunities, or exemptions, in respect of travel or residence, and in respect of public educational institutions, as should be accorded to the most favored nation in the country in which they should be respectively visiting or residing* (16 Stat. 739).

"This brings us to the treaty concluded November 17, 1880, which refers to the prior treaties of 1858 and 1868. To that treaty the Senate gave its assent on May 5, 1881, and it was ratified by the President on the 9th of May, 1881. Its first three articles are as follows:

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"'ARTICLE 2. Chinese subjects, whether proceeding to

> the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, *and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.'* " [53]
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> * * * * * * * *

Congress passed an act on May 6, 1882, and amended it on July 5, 1884. The entire act, as amended, is set forth in a footnote to the Supreme Court decision. This statute prescribed the certificate to be produced by the Chinese laborer as the "only evidence permissible to establish his right to re-enter into the United States;" and the question was whether it was applicable to a Chinese laborer who resided in this country at the date of the treaty of 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884. The act of Congress was sweeping in character. Section 1 provided that ninety days after the passage of the act the coming of Chinese laborers into the United States was suspended for a period of ten years. "And during such suspension *it shall not be lawful for any Chinese laborer to come from any port or place,* or having so come to remain within the United States." The court held that the act did not apply to the laborer in question, and he was entitled to re-enter the United States without any certificate. A Chinese laborer had been detained upon the vessel in the harbor of San Francisco, and had subsequently filed his petition for a writ of *habeas corpus. Thus the Supreme Court in the face of the sweeping language of a subsequent legislative act construed Article II of the Chinese Treaty of 1880, involving the most favored nation principle, as self-executing,* so that in the language of the court (page 560) "the legislation of Congress and the stipulations of the treaty may stand together."

In re Chung Toy Ho,[54] Deady, J., held that the wife and children of a Chinese merchant entitled under Article II of the Treaty of 1880 to come within and dwell in the United States

[53] 112 U. S. 540, 541.

[54] 42 Fed. 398.

were entitled to come into the country with him or after him as such wife and children with the certificate prescribed in § 6 of the Act of 1884, the court saying:

> "My conclusion is that under the treaty and statute taken together, a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him and have with him his wife and children. The company of the one and the care and custody of the other are his by natural right, and he ought not to be deprived of either unless the intention of Congress to do so is clear and unmistakable."

In United States *v.* Mrs. Gue Lim,[55] the Supreme Court adopted the view of the law just announced, saying:

> "We agree with the reasoning contained in the opinion delivered by Judge Deady."

It is apparent therefore that favored nation clauses have been held, both by the federal and state courts, to be something more than executory contracts. "In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land," said Mr. Justice Davis, speaking for the Supreme Court in 1869.[56]

The latest case to throw light upon these very interesting questions grew out of the act of Congress in passing what is known as the Canadian Reciprocity Act of July 26, 1911. A reciprocal trade agreement, not a treaty, was entered into between representatives acting in behalf of two contracting Powers and, by its terms, it required the assent of the Congress in Washington and the Parliament at Ottawa before it was to be deemed to be in force and effect. It was based on mutual concession and the articles entitled to either free entry or lower rates were set forth on either side with precision. In giving its assent to the agreement as negotiated, the House proposed, and the Senate accepted, a provision known as § 2, providing for the free entry into the United States of certain kinds of Canadian pulp and paper. These articles had not been the subject of reciprocal agreement. As is well known, Canada

[55] 176 U. S. 459.

[56] Haver *v.* Yaker, 9 Wall. 32.

failed to ratify and reciprocity never became an actuality. Section 2, however, as an independent provision outside the scope of the reciprocity convention, took effect immediately upon the approval of the act like any other law, and so the United States officially recognized.[57] At once the claim was made for the free entry of similar pulp and paper imported from various European countries with which we had favored nation treaties upon the ground of the gratuitous, not reciprocal, concession to Canada. The claim in the first instance took the form of a diplomatic protest, but President Taft promptly took the ground that the question was judicial. In a message transmitted to the House of Representatives on January 9, 1913, and printed in the Congressional Record of that date, he said:

> "The question of law now raised in reference to the proposed admission of free wood pulp and paper from European countries with which we have treaties containing favored-nation clauses are two:
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> "First, whether the second section of the act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes, in view of the failure of the Dominion of Canada to pass a similar act, is to be regarded as existing law in full force and effect; and, second, assuming an affirmative answer to the first question, whether the favored-nation clause extends the benefits of the second section of this act to the countries with which we have treaties containing favored-nation clauses. *As the treaties are the law of the land and as the reciprocity act is a statute in part at least to become operative upon conditions, the question of the effect of the one upon the other can be better considered in a court of law than by the executive construction.*
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> "I have therefore directed that the refusal of the Treasury Department to admit wood pulp and paper and other articles under the joint effect of the Canadian reciprocity act and the favored-nation clauses of the treaties with other countries shall stand as the attitude of the government, pending the consideration of the two questions above stated *before the tribunals regularly appointed by law for the consideration of such questions.*"

[57] Treasury Decision 31772.

The Tariff Law of August 5, 1909, commonly known as the Payne Law, divested the usual federal courts of jurisdiction in tariff cases and created a special tribunal known as the United States Court of Customs Appeals, which usually sits in Washington, as the court of last resort. The right of review by writ of *certiorari* from the Supreme Court to the Circuit Courts of Appeal, formerly existing, was cut off. Originally, various contentions were made on behalf of the government, but before the Court of Customs Appeals the issue narrowed down practically to a single contention. The argument that Canada was not a nation or country within the meaning of our treaties was not pressed. It was not contended that Congress in passing § 2 of the Canadian Reciprocity Act had abrogated existing treaty provisions. On the other hand, it was conceded that the law was passed with knowledge of the terms of the treaties, and with at least some consideration of the possible consequence of the enactment. The question whether the assent of the House was necessary was not involved. The government placed its main reliance upon certain language found in Taylor *v.* Morton.[58] This was tantamount to a contention that the question was after all essentially political, and not judicial as President Taft had in effect stated. The court upheld the right of the importers of European pulp and paper to free entry and necessarily held the favored nation clause to be self-executing in character. Four judges concurred in this opinion, which was written by the Presiding Judge Montgomery. One judge dissented. The opinions are lengthy but they should be carefully studied.[59]

In reviewing Taylor *v.* Morton,[60] the court said:

"The first question discussed in the opinion was stated by the learned justice as follows:

"If an act of Congress should levy a duty upon imports, which an existing commercial treaty declares shall not be levied, so that the treaty is in conflict with the act, does

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[58] 2 Curt. 453.

[59] American Express Co., et al. *v.* United States, and Bertuch & Co., et al. *v.* United States, 4 Ct. Cust. App. —; Treasury Decisions, 33434.

[60] *Supra.*

the former or the latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied?

"In discussing this question, the conclusion is reached by irrefragable logic that as under the constitution laws enacted by Congress and treaties made under the authority of the United States are alike the supreme law of the land, that there is nothing to indicate that the one is paramount to the other, and it follows that where a law is enacted which repeals or abrogates a treaty in whole or in part, the law being later in point of time, must be the rule which controls judicial action. This rule being determined, it is then said:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise?

"This was negatived, and it was said:

"These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of the existing laws. And it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere in our system of government. On the other hand, if it be admitted that Congress has these powers, it is wholly immaterial to inquire whether they have, by the act in question, departed from the treaty or not; or if they have, whether such departure was accidental or designed, and if the latter, whether the reasons therefor were good or bad. If by the act in question they have not departed from the treaty the plaintiff has no case. If they have, their act is the municipal law of the country, and any complaint, either by the citizen or the foreigner, must be made to those who alone are empowered by the Constitution to judge of its grounds and act as may be suitable and just.

"It is obvious that in the use of this language it was implied by the learned justice all the way through that the tariff act of 1842 in fact fixed a duty of $40 per ton on hemp imported from Russia, and that the question which was held to be a political one was whether there was just ground for the enactment by Congress of such a law which in effect discriminated against Russian hemp, and therefore to an extent abrogated the treaty with Russia. We do not construe this language as in any way in conflict with the rule that the courts have the right to enforce the subsisting provisions of a treaty as a part of the law of the land. Indeed much of the discussion in the opinion of Justice Curtis would have been wholly foreign to the case had such been the view which he entertained."

With respect to Whitney *v.* Robinson,[61] the court said:

"We do not read this opinion as affirming that the courts can not in any case construe or give effect to existing treaties, but quite the reverse. The opinion considers a self-executing treaty as a part of the law of the land. It also declares in terms that it is the duty of the court to construe and give effect to the latest expression of the sovereign will. The case does hold, what is conceded by the importers' counsel in the present case, that if the treaty provisions have been repealed by an act of Congress, they are no longer of force, and that the considerations of justice, equity, or policy of such repeal, or whether such action of Congress was had with due regard to the rights of the treaty nation, are not questions with which the courts can deal, and this we fully recognize."

And finally on the question as to whether favored nation provisions are executory or self-executing this language is used:

"It has been suggested that article 9 above quoted is not a controlling provision of the favored nation treaty; that article 5, providing against the imposition of higher duties by each contracting nation than are imposed upon those of any other nation or country, exhausts that subject; and that article 9, in providing that if either party shall grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, can not be held to have reference to impor-

[61] *Supra.*

tations. But if the treaty be examined, it will be found that the subjects of commerce and navigation are treated of in various paragraphs of the treaty preceding article 9 in question. In fact the first eight articles are devoted to those subjects. If it be said that full treatment of either of these subjects as declaratory of rights excludes such subject from the provisions of article 9, then it follows that article 9 has *nothing whatever to act upon.* It relates to a particular favor in *navigation or commerce* and both subjects are dealt with *equally in the preceding eight articles.* The fair interpretation is therefore that while article 5 declares the right and is promissory in its terms, and provides against legislation which shall impose higher duties upon articles imported from one nation to the other than are imposed upon articles from any other foreign nation, article 9 was designed to provide a remedy or declare a right which attaches not in case of such adverse legislation, but in case conditions shall arise which make room for its operation, namely, when a particular favor, either in navigation or in commerce is granted to some other nation. Whenever this occurs, then article 9 has operation and not before, either as it effects navigation or commerce. That the introduction of commodities from Canada into this country is commerce needs only to be stated to be accepted. It seems clear, therefore, that this article has application in the present case.

"The result of the decisions we think is this, that the courts will not enforce a treaty which is executory in its character for the obvious reason that it has not the power to do so. Legislation must be had to give effect to such executory provisions. The courts, under the constitutional provision that a treaty is like a law of Congress a part of the law of the land, will, as to a self-executing provision in a treaty, enforce it whenever the occasion and conditions arise which attach the self-executing provision to existing facts. Where it is claimed that a treaty and a subsequent congressional enactment conflict, it is essential, and it has been common for the courts, to construe the treaty with the law to ascertain whether the latter displaces the former, or whether it creates a condition to which the self-executing provisions of the treaty apply.

"We proceed to consider whether the provisions of these treaties are self-executing.

"Take as an illustration our treaty with Austria-Hungary:

"No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominions of Austria; and no higher or other duties shall be imposed on the importation into the dominions of Austria of any article the produce or manufacture of the United States than are or shall be repayable on the like article, being the produce or manufacture of any other foreign country. * * *

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party. * * *

"Similar provisions are contained in other treaties, but as it is conceded by the government in the present case that the position of each of the nations whose products are here in question is equal to that of the one having the most advantageous treaty, we need not set them forth at length.

"If this were an agreement between parties, there would be little difficulty in saying that this is a self-executing provision. The grant of any privilege by one party to the contract to a third person would under such language as that employed immediately inure to the benefit of the other party to the contract. We see no reason why the same interpretation should not be placed upon the language of a treaty. The privilege could not immediately become common to the party to this agreement if it depended upon some future act by another or upon further legislation to make the same effective. If legislation were required before it could be given effect, it would be a contradiction of terms to say that the privilege immediately became common to the parties to the treaty. A more inapt term intended to convey a promise of a future legislative grant of a right could hardly have been devised."

And so it was held that a favored nation provision may be self-executing in so far as it relates to goods the produce and manufacture of and imported from a contracting nation. Indeed, if the favored nation clause is self-executing as applied to the Chinese Exclusion cases, it is difficult to see why it is not so when invoked with respect to imported merchandise, for it is hard to conceive of a question more surcharged with in-

ternational political dynamite than the status of an alien subject within our domain. If the status of a Chinese subject be a judicial and not a political question, how can it be persuasively contended that the dutiable status of Chinese merchandise is a purely political question into which the courts may not even inquire? What would seem to be the sound and true distinction was tersely stated by Judge Montgomery.

Treaties have a dual aspect undoubtedly, one judicial and one that is wholly political, as may readily be conceived. A treaty may simply recite a compact of offensive-defensive alliance between two or more nations acting in their sovereign capacities. Surely no court would undertake to inquire into the question whether one or the other of the contracting powers had violated the compact. Such a question would be clearly political. On the other hand, a treaty may operate so as to confer private or individual rights within the respective jurisdiction of the contracting powers. Such treaties under our jurisprudence partake of the nature of statute law and, like it, are capable of enforcement by the courts in precisely the same manner. Stated in another way, whenever a treaty confers rights which partake of the nature of municipal law and rights of a nature to be enforced in a court of law, as a case protesting a rate of duty assessed by a collector of customs clearly is, for instance, the court resorts to the treaty for a rule of decision as it would to a statute. Such is the intimation of In re Cooper,[61a] citing with approval the language in U. S. *v.* Rauscher and other cases. It is no doubt true that there are conflicting tendencies observable in the reported decisions, but there are none of them which are not entirely susceptible of reconciliation with this line of distinction.

Early in its history, the Supreme Court was called upon to decide whether the French Schooner Peggy, which was captured property and which had been condemned to forfeiture by the court below, should be restored pursuant to Article IV of the Treaty of September 30, 1800. In holding that the schooner should be restored to its French owners, Chief Justice Marshall used this illuminating language:

[61a] 143 U. S. 472.

> "The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in general, superintended by, the executive of each nation; and, therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an act of Congress; although restoration may be an executive, when viewed as a substantive, act independent of, and unconnected with, other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper." [62]

A contention that a question is political, and not judicial, in character does not necessarily imply that the treaty imports an executory contract but a contention that a treaty provision is executory does imply a political issue. The executive may deal with a treaty question which is political, but if so the language in dispute must be self-executing upon the theory that the executive can only execute the law as he finds it or the treaty which has the force of a law. He cannot make the law. If the treaty merely imports an executory contract, it can only have the force of law at the pleasure and in the discretion of the Legislature.

It is this latter contention, more or less avowedly made in the wood pulp cases, which would, if upheld, make our solemn treaty compacts, in principle at least, mere empty promises. *Uberrima fides*, the Supreme Court has said, is the guiding maxim of treaty interpretation.[63] Where the treaty power enters into an engagement which it may be powerless to enforce in order to induce a reciprocal engagement capable of enforcement, the nation's good faith, which should be unimpeachable, becomes at once impeached. Mr. Justice Story in his Commentaries observes:

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[62] United States *v.* Schooner Peggy, 1 Cranch 103, 108.
[63] Tucker *v.* Alexandroff, 183 U. S. 424.

"The propriety of this clause would seem to result from the very nature of the Constitution. If it was to establish a national government that government ought, to the extent of its powers and rights, to be supreme. It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet that in the exercise of those powers it should not be supreme. * * * In regard to treaties, there is equal reason why they should be held, when made, to be the supreme law of the land. It is to be considered that treaties constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of treaty obligations would be visited by reprisals or war. It is, therefore, indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws. This will not prevent them from being canceled or abrogated by the nation upon grave and suitable occasions; for it will not be disputed that they are subject to the legislative power, and may be repealed, like other laws, at its pleasure, or they may be varied by new treaties." [64]

One of the vital points at which the Confederation, which was a weak and ineffective association of states, broke down hopelessly was in a complete paralysis of all power to enforce treaties. The Supreme Court has on more than one occasion seized the opportunity to point out that in its treaties and conventions with foreign nations this government is a unit.[65] The power of treaty abrogation vested in Congress is in itself a serious check upon the treaty function. It would be melancholy indeed if the framers of the Constitution had failed utterly in their efforts to provide adequately for the enforcement of unrescinded treaty stipulations.

In one of the earlier Chinese cases [66] holding the favored nation Article VI of the Burlingame Treaty of 1868 to be a part of the supreme law of the land, one of the federal judges sitting in

[64] Cited in Butler's Treaty Making Power, Vol. 1, p. 405.

[65] Downes *v.* Bidwell, 182 U. S. 244; Chae Chan Ping *v.* United States, 130 U. S. 581.

[66] Parrott's Chinese Case, 6 Sawyer 349.

the lower court expressed sympathy for the demand that the treaty should be rescinded or modified. While operative, however, it conferred certain privileges, and in upholding them he used language which may aptly close this discussion of favored nation treaty rights:

> "Those rights it is the duty of the courts to maintain and of the Government to enforce."

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